IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

Upon Remand from the United States Supreme Court

STATE OF TENNESSEE v. JOHN RAMSEY DUNCAN

Direct Appeal from the Criminal Court for Davidson County No. 2002-B-1062 Seth Norman, Judge

No. M2005-01431-CCA-RM-CD - Filed January 30, 2008

Following a jury trial in May 2003, Defendant was convicted of four counts of rape of a child and four counts of aggravated sexual battery. The trial court sentenced Defendant to twenty-two years on each child rape conviction and to ten years for each aggravated sexual battery conviction. Counts one and two for rape of a child were ordered to run consecutively to each other, while all other counts were to run concurrently with count one. This created an effective sentence of forty-four years. On February 1, 2005, this Court affirmed Defendant's convictions and the imposition of consecutive sentencing. However, this Court, under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), modified Defendant's sentence to twenty years for each rape of a child conviction and eight years for each aggravated sexual battery sentence for a total effective sentence of forty years. The State appealed this decision and the Tennessee Supreme Court remanded for reconsideration under State v. Gomez, 163 S.W.3d 632 (Tenn. 2005). On July 27, 2005, this Court affirmed Defendant's convictions and the sentences as imposed by the trial court. The Tennessee Supreme Court denied Defendant's application for permission to appeal and Defendant then appealed to the United States Supreme Court. On February 20, 2007, the Supreme Court vacated the July 2005 decision of this Court and remanded Defendant's case for reconsideration under Cunningham v. California, _____ U.S. ____, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). We ordered further briefing by both parties. After a thorough review of the record, we affirm Defendant's convictions and the imposition of consecutive sentencing. However, in light of Cunningham and Blakely, we modify Defendant's sentences to twenty years for each rape of a child conviction and to eight years for each aggravated sexual battery sentence for a total effective sentence of forty years.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Modified

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

David R. Heroux, Nashville, Tennessee, (on appeal); and Mike Anderson, Nashville, Tennessee, (at trial) for the appellant, John Ramsey Duncan.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

We outlined the facts of this case in our February 2005 opinion as follows:

In February, 2002, social worker Cindy Holdsworth began counseling the Duncan family after the victim, M.W., told her school principal that Defendant, who was her stepfather, had punished her by pulling her to her feet by her hair. (The minor victim will be referred to by her initials). The family at this time consisted of nine-year-old M.W.; Delores Duncan; M.W.'s mother; John, Jr., M.W.'s baby brother; and Defendant. Ms. Holdsworth said that she initially visited the family two or three times a week. She soon became concerned for M.W.'s safety, however, and began daily visits in March. Ms. Holdsworth said that M.W. was visibly afraid of Defendant whenever she was with him, so Ms. Holdsworth began visiting the child alone at her school.

After the family began counseling sessions with Ms. Holdsworth, Ms. Duncan arranged for M.W. to go to the home of a neighbor, Julie Carter, after school until Ms. Duncan arrived home from work so that M.W. would not be alone with Defendant. M.W. and Ashley Carter, Ms. Carter's daughter, were friends. Ms. Carter said that when it was time for M.W. to go home, the child often screamed and cried. Ms. Carter asked M.W. one day if Defendant had ever touched her inappropriately. M.W. asked Ms. Carter if she could tell Ashley and then let Ashley tell her mother. The two girls left the room. When they returned, Ashley told her mother that M.W. said that "he made her lick it like a lollipop."

Ms. Carter called Ms. Holdsworth on April 2, 2002, and said that M.W. had described some incidents involving Defendant in very graphic sexual detail. Ms. Holdsworth spoke with M.W. at school the next day. Although the child was at first reluctant to speak, M.W. eventually described certain sexual acts that Defendant had made her perform. M.W. told Ms. Holdsworth that the sexual contacts started when M.W. was six or seven years old. Although Ms. Holdsworth said that M.W. did not always have a time frame for the incidents, she described the incidents in detail. M.W. said that Defendant told her he knew what he was doing was wrong, but that he was punishing her for misbehaving.

After Ms. Holdsworth talked with M.W., the child was removed from her home and sent to her maternal grandfather's house. Ms. Holdsworth said that she met with Ms. Duncan the next day to explain what was happening, and Ms. Duncan was devastated and shocked.

Holly Gallion, a nurse practitioner with Our Kids Center, testified that she reviewed the physical exam performed on M.W. on May 14, 2002. Ms. Gallion said that the examination was normal and showed no signs of physical injury, infection or trauma. Ms. Gallion said that she reviewed the information gathered by Lisa Dupree, a social worker with Our Kids Center. Ms. Gallion said that M.W.'s examination was consistent with the allegations of sexual abuse relayed to Ms. Dupree which consisted of rubbing and touching without penile penetration. Ms. Gallion admitted on cross-examination that the results of the examination were also consistent with an examination of a child who had not been sexually abused.

Lisa Dupree, a social worker with Our Kids Center, said that developmentally M.W. was "grossly average." Ms. Dupree said that the only anatomical information M.W. seemed to lack was the difference between a vaginal opening and her "private area" in general. As part of the examination, Ms. Dupree said that she always tried to ascertain what type of contact was incurred in order to assess the child's level of risk. M.W. described penile-genital, penile-rectal and penile-oral contact. M.W. said that the contacts occurred more than once and were painful. Ms. Dupree said that M.W. exhibited a good deal of anxiety over the performance of the examination.

M.W. was ten years old at the time of the trial. She testified that Defendant was sometimes home when she got home from school, and that her mother usually got home around 6:00 p.m. M.W. said that she did not know how old she was when the sexual contacts began, but they happened "a bunch." M.W. said she thought the contacts occurred during a one-year time frame in the Defendant's bedroom, the bathroom and the living room.

On one occasion, M.W. said that Defendant made her take her clothes off in the bathroom. Defendant was also nude. Defendant then made M.W. get on her knees and touch his "private" with her hand and "go up and down." Defendant made her lie down on her back and then licked her on what she described as the "bottom part of my front."

In a second incident, Defendant made M.W. put on a special outfit without any underwear when she got home from school. He told her to sit down on the floor in the living room and pull her skirt up. Defendant then took a photograph of M.W. with his camera. Defendant also took a photograph of his penis in M.W.'s mouth. Defendant told M.W. that if she told anyone, he would send the photographs to

everybody at her school. During a third incident, Defendant performed oral sex on M.W. in the bathroom.

M.W. said Defendant worked at the Stage One Video. There were also tanning booths inside the store. During one incident, Defendant made M.W. perform oral sex on him in one of the tanning booths. M.W. said she was nine-years-old when that incident occurred.

M.W. said that on another occasion, Defendant made her masturbate him in his bedroom, and made her lick between the cheeks of his buttocks while they were in the living room. Another incident involved M.W. bending over in the bathroom while Defendant rubbed his penis on her buttocks.

M.W. said that "milk water" would come out of Defendant's penis during some of the contacts. She said that the contacts happened numerous times and listed the locations for the various acts. M.W. said she told Defendant to stop once, but he continued the contacts. M.W. said that the contacts occurred while her mother was at work. Although M.W. had shared a bedroom with her older brother, Corey, he had moved out before the incidents began. M.W. accurately identified the body parts involved in the contacts with Defendant on anatomically correct male and female dolls.

On cross-examination, M.W. said that she did not stay home alone with Corey because he was either working or with friends during the day. M.W. said that she went to day care during summer vacation. M.W. said she was mad when Defendant made Corey move out. M.W. said that both her mother and Defendant disciplined her by either grounding her or refusing to let her watch television. M.W. said that she did not know how to use the internet, but she watched the news on television and was familiar with the recent stories concerning pedophile charges against Catholic priests. M.W. said that she had talked to a number of people about the incidents, and everyone was nice to her.

Ms. Duncan said that she usually got home from work around 5:30 p.m. Defendant worked during the day at a grocery store and was usually home between 3:00 and 4:00. In the evenings or on weekends, he worked at the video store. When M.W. was in the first and second grades, she went to a daycare center after school. Then Defendant's schedule allowed him to be home in the afternoon, and M.W. started walking home from school. She was usually home by 3:15 p.m. John, Jr., stayed at a day care center, and Defendant usually picked him up around 5:00 or 5:30 p.m.

Ms. Duncan said that she did not think M.W. had ever accessed the internet through their home computer. Ms. Duncan said that other than a few general questions about boys, she and M.W. had never discussed any topics concerning sex.

Ms. Duncan said that she first learned about the allegations on a Wednesday night in April, 2002, when a social worker came to her house. She discussed matters further with Ms. Holdsworth on Thursday morning. As a result of these conversations, Ms. Duncan sent M.W. to her maternal grandfather's house on Thursday and Friday nights. On Saturday night, Ms. Duncan moved out of the apartment.

Ms. Duncan said that Defendant had bought her a digital camera for her birthday in September, 2001. Ms. Duncan did not know how to operate the camera, but Defendant frequently took photographs of the children and downloaded the film onto the computer. Ms. Duncan said she returned to the house a few days after she moved out to retrieve some clothes for the baby. She turned on the computer to download some information she needed and discovered that the tower encasing the computer's hard drive was missing. Defendant told her he did not know what happened to the tower but did not file a police report to report the stolen computer. Nothing else was missing from the apartment.

Ms. Duncan said that Ms. Holdsworth told her not to probe M.W. for information about the incidents but let the child tell her about the allegations on her own. Ms. Duncan said that she still did not know everything that M.W. told the social workers.

On cross-examination, Ms. Duncan said that she did not have any concerns over M.W. sharing a bedroom with her older son while Corey lived at home. Ms. Duncan said that Corey babysat M.W. during the summer of 2000, but that M.W. was at home alone during the summers of 2001 and 2002. Ms. Duncan admitted that the family had experienced financial difficulties over the past few years, and that Defendant had threatened to leave her and take John, Jr. Ms. Duncan said that Defendant was the main disciplinarian in the family, but she would sometimes counteract his punishment if she thought she needed to.

Defendant testified on his own behalf. He agreed with Ms. Duncan's assessment that he was the family's disciplinarian, and admitted that there may have been times when his punishment was too harsh. Defendant remembered that he told M.W. one time that if she did not behave, he would send her to "juvenile."

Defendant said that it was not necessary to know a password before connecting to the internet on the home computer, and that one simply had to push the "connect" button. Defendant said that he discovered a pornographic magazine on top of the dresser in Corey's and M.W.'s bedroom. He found other magazines when he searched the room further. Defendant said that M.W. would often leave the house without telling

anyone where she was going. Defendant said that Ms. Holdsworth became involved with the family when M.W. told her school's principal around February 15, 2002, that Defendant had picked her up by her hair while he was punishing her. Defendant denied that he had ever sexually abused M.W.

On cross-examination, Defendant said that he may have spanked M.W. once or twice, and that he also may have slapped her across the face "a couple of times." Defendant explained, however, that he had a good relationship with M.W. until "the hair-pulling incident." Defendant admitted that M.W. did not seem to be comfortable around him after that and began going to Ms. Carter's house after school.

Defendant said that it was possible that his wife encouraged M.W. to accuse him of sexual abuse. Defendant said that M.W. received a lot of attention after she reported that Defendant had pulled her hair, and received a lot more attention after she accused him of sexual abuse. Defendant admitted that he did not initially tell the police about his suspicions that M.W. may have learned about various sexual acts from the internet or pornographic magazines. He also admitted that he found the pornographic magazines about two and one-half years before the sexual allegations. Defendant said that M.W. had spent one summer alone with Corey.

State v. John Ramsey Duncan, No. M2003-01820-CCA-R3-CD, 2005 WL 292345, at *1-4 (Tenn. Crim. App., at Nashville, February 1, 2005), *perm. app. denied* (Tenn. June 20, 2005).

II. Sentencing Issues

After a sentencing hearing, the trial court sentenced Defendant to twenty-two years for each conviction of rape of a child to be served consecutively with each other and to ten years for each conviction of aggravated sexual battery to be served concurrently with count one of rape of a child. In formulating these sentences, the trial court found two applicable sentencing enhancement factors. The first factor found was that Defendant allowed the victim to be treated with exceptional cruelty during the commission of the offenses and the second factor found was that the offenses involved a victim and were committed to gratify Defendant's desire for pleasure or excitement. *See* T.C.A. § 40-35-114(6), (8) (2003). The trial court found no mitigating factors. The trial court based the decision to run the sentences consecutively on the aggravating circumstances arising from Defendant's relationship with the victim, the nature and scope of the sexual acts, the extent of the residual physical or mental damage to the victim, and, especially, the time span of Defendant's undetected sexual activity.

A. The Effect of the *Blakely* and *Cunningham* Decisions

At the time of the offenses, Tennessee Code Annotated section 40-35-210(c), (d) provided:

- (c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.
- (d) Should there be enhancement but no mitigating factors for a Class B, C, D, or E felony then the court may set the sentence above the minimum in that range but still within the range. Should there be enhancement factors but no mitigating factors for a Class A felony, then the court shall set the sentence at or above the midpoint of the range

As a Range I standard offender convicted of rape of a child, a Class A felony, Defendant is subject to a sentence of between fifteen and twenty-five years. T.C.A. § 40-35-112(a)(1). The presumptive sentence for Defendant is twenty years. As a Range I standard offender convicted of aggravated sexual battery, a Class B felony, Defendant is subject to a sentence of between eight and twelve years. *Id.* § 40-35-112(a)(2). The presumptive sentence is the minimum sentence of eight years.

In *Blakely*, the United States Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000). The *Apprendi* court noted that nothing "suggests that it is impermissible for judges to exercise discretion - taking into consideration various factors relating both to offense and offender - in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481, 120 S. Ct. at 2358. In a later case the Supreme Court held, "if a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct. 2428, 2439, 153 L. Ed. 2d 556 (2002).

In *Blakely*, the Supreme Court defined the terminology of the "statutory maximum" as applied in *Apprendi*. The Court clarified that the statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 524 U.S. at 302, 124 S. Ct. at 2537. The Supreme Court again restated this holding in *Cunningham*.

In *Cunningham*, California's sentencing scheme (known as DSL, determinate sentencing law) provided for three precise terms of imprisonment - lower, middle, and upper. The defendant in that case was sentenced to the upper term after the trial court found aggravating circumstances. The California Penal Code controlled the judge's choice and provided that "the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime." Cal. Penal Code § 1170(b) (West Supp. 2006). The circumstance in aggravation only needed to be established by a preponderance of the evidence. *Cunningham*, U.S. at , 127 S.

Ct. at 868. The Supreme Court held, "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt... the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. (citing *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2348).

In *Gomez II*, our supreme court reviewed the defendants' sentencing claims under plain error analysis. *Gomez*, 2007 WL 2917726, at *2. Rule 52 of the Tennessee Rules of Criminal Procedure provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in a motion for new trial or assigned as error on appeal." Relief is granted under plain error review "only where five prerequisites are met: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is 'necessary to do substantial justice." *Gomez*, 2007 WL 2917726 at *2 (quoting *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

In the case *sub judice*, the record clearly establishes what occurred in the trial court in determining the length of Defendant's sentences, and thus the first prerequisite is met. In *Gomez II*, our Supreme Court concluded that "the trial court's application of the two other enhancement factors [not based on the defendants' prior convictions] breached a clear and unequivocal rule of law" in light of *Cunningham*. *Gomez II*, 2007 WL 2917726, at *6. Further, the trial court's determination that enhancement factors (6) and (8) were applicable to increase Defendant's sentences deprived him of the Sixth Amendment right to have a jury determine whether those enhancement factors applied and, thus, a substantial right of the accused was adversely affected. *See id*. At the time of Defendant's sentencing hearing, *Gomez I*, which concluded that Tennessee's sentencing structure did not violate Sixth Amendment principles, was controlling precedent. Therefore, it cannot be said that Defendant waived his Sixth Amendment claim for tactical reasons. *See id*. Finally, Defendant's sentences were enhanced based on factors other than the existence of a prior criminal record.

In the instant case, we conclude that *Blakely* and *Cunningham* preclude the application of the enhancement factors in Tennessee Code Annotated section 40-35-114(6),(8) unless they have been found by a jury. While neither *Blakely* nor *Cunningham* forbid the enhancement of a sentence due to prior convictions, Defendant does not have a criminal record. For the foregoing reasons, we reduce each of Defendant's sentences to the statutory presumptive sentence. The sentences for rape of a child are reduced to twenty years and the sentences for aggravated sexual battery are reduced to eight years.

B. Consecutive Sentencing

This Court has consistently held that *Blakely* does not impact consecutive sentencing. *See State v. William Shane Bright*, No. E2006-01906-CCA-R3-CD, 2007 WL 1259176, at *3 n.1 (Tenn. Crim. App., at Knoxville, April 30, 2007) *perm. app. denied* (Tenn. July 6, 2007); *State v. Earice Roberts*, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *14-15 (Tenn. Crim. App., at Jackson, Nov. 23, 2004) *perm. app. denied* (Tenn. April 6, 2005); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *16 (Tenn. Crim. App., Nashville, Nov. 9, 2004) *perm. app. denied* (Tenn. March 15, 2005). We have previously addressed the issue of consecutive sentencing in this case; therefore, we reaffirm our prior analysis and conclusion. *See State v. John Ramsey Duncan*, No. M2003-01820-CCA-R3-CD, 2005 WL 292345, at *1-4 (Tenn. Crim. App., at Nashville, February 1, 2005), *perm. app. denied* (Tenn. June 20, 2005).

CONCLUSION

After a thorough review of the record, we modify Defendant's sentences to twenty years for each conviction of rape of a child and to eight years for each conviction of aggravated sexual battery. We affirm the trial court's judgment that the rape of a child convictions run consecutively with each other and that the aggravated sexual battery convictions run concurrently with count one of rape of a child, for an effective sentence of forty years. For all issues, other than sentencing, we adopt our opinion of February 1, 2005.

THOMAS T. WOODALL, JUDGE